STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Murphy, P.J., Cooper and Kelly, JJ.)

MARGARET JENKINS, as Personal Representative of the ESTATE OF MATTIE HOWARD, DECEASED,

Plaintiff-Appellee,

v

JAYESH KUMAR PATEL, M.D., and COMPREHENSIVE HEALTH SERVICES, INC., a Michigan Corporation, d/b/a THE WELLNESS PLAN, Jointly and Severally,

Defendants-Appellants. /

Supreme Court
No: 123957

Court of Appeals
No: 233116

Wayne County Circuit Court
No. 98-808834 NH

BRIEF ON APPEAL BY JAYESH KUMAR PATEL, M.D., AND COMPREHENSIVE HEALTH SERVICES d/b/a THE WELLNESS PLAN

****ORAL ARGUMENT REQUESTED****

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STATUTES, COURT RULES AND OTHER AUTHORITIES

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STATEMENT REGARDING JURISDICTION

Defendants Jayesh Kumar Patel, M.D., and Comprehensive Health Services, Inc., appeal from the Court of Appeals' published April 1, 2003, decision in defendants' appeal from the Wayne County Circuit Court's judgment for plaintiff. Defendants' timely motion for rehearing was denied by the Court of Appeals by order of May 15, 2003. Judgment was entered in the circuit court on May 20, 2000; defendants' post judgment motions were denied by order of February 20, 2001.

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE CAP ON NONECONOMIC DAMAGES APPLIES TO THE DAMAGES FOR LOSS OF SOCIETY AND COMPANIONSHIP AWARDED IN THIS ACTION ALLEGING MEDICAL MALPRACTICE, AND THE COURT OF APPEALS' TORTURED CONSTRUCTION OF THE WRONGFUL DEATH ACT AND CAP STATUTE TO AVOID THE LEGISLATURE'S CLEAR DIRECTIVE SHOULD BE VACATED BY THIS COURT?

Defendants Jayesh Kumar Patel, M.D., and Comprehensive Health Services d/b/a The Wellness Plan submit the answer is "Yes."

Plaintiff presumably will assert the answer is "No."

The Court of Appeals held the answer is "No."

The trial court held the answer is "No."

II

WHETHER GIVEN THE EXPRESS DETERMINATION BY THE SUCCESSOR TRIAL COURT JUDGE THAT THE VERDICT WAS CLEARLY EXCESSIVE, BUT THAT HE COULD NOT DETERMINE THE APPROPRIATE AMOUNT FOR REMITTITUR BECAUSE HE HAD NOT PRESIDED AT TRIAL AND VIEWED THE WITNESSES, THE COURT OF APPEALS SHOULD HAVE REMANDED FOR A NEW TRIAL ON ALL ISSUES?

Defendants Jayesh Kumar Patel, M.D., and Comprehensive Health Services d/b/a The Wellness Plan submit the answer is "Yes."

Plaintiff presumably will assert the answer is "No."

The Court of Appeals held the answer is "No."

The trial court held the answer is "No."

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STATEMENT OF FACTS

Defendants Jayesh Kumar Patel, M.D., and Comprehensive Health Services, Inc., appeal from the Court of Appeals' published decision on defendants' appeal from the $10,000,000 judgment entered in this action alleging medical malpractice and wrongful death (Appx 37a, opinion, Appx 48a, judgment. The judgment was entered in the Wayne County Circuit Court in favor of plaintiff, Margaret Jenkins, as Personal Representative of the Estate of Mattie Howard. Damages were sought by plaintiff, and the entire $10,000,000 was awarded by the jury, solely for the "loss of society and companionship" claimed by 7 adult children and 7 elderly siblings of Mattie Howard as a result of her death at 68 years of age on November 17, 1995.

Plaintiff alleged that defendant Dr. Patel failed to adequately treat and control Mattie Howard's chronic hypertension (high blood pressure) and renal insufficiency (kidney disease), and that this was a proximate cause of Ms. Howard's death. There was no evidence or claim presented regarding any economic damages, such as loss of support, medical expenses, or funeral expenses. There was also no claim for or instruction regarding conscious pain and suffering by Mattie Howard (see damages instructions at Appx 36a, Tr 5/18/00, p 190). It is undisputed that the only damages sought and awarded by the jury here were for noneconomic loss of society and companionship sustained by Mattie Howard's adult children and siblings (Appx 39a, defendants' motion for remittitur, ¶ 6, Appx 41a, plaintiff's response to motion for remittitur, paragraph six, admitting that "economic damages were not an issue at trial," and that "there was no evidence presented at trial that anyone was financially dependent on plaintiff's decedent.")

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Underlying Facts

Dr. Patel first began treating Ms. Howard in May of 1992 in his capacity as an internal medicine physician, essentially engaged in family practice. At that time, Ms. Howard, who recently had been hospitalized for a stroke, had a 15 year history of hypertension, and an 80 percent loss of kidney function (renal failure) (Appx 16a-21a, 23a-24a, Baskin, Tr 5/17/00, pp 48-53, 76-77).

Dr. Patel saw plaintiff in his office on several occasions on each of which he monitored her blood pressure and/or adjusted the amount of her hypertension medication. At an office visit on November 22, 1993, plaintiff complained of an occasional nose bleed and nose itching. Dr. Patel ordered laboratory blood tests. When the results of those blood tests were received on December 6, 1993, Dr. Patel determined that there was a further deterioration of kidney function, and concluded that plaintiff needed "to see nephrology ASAP." Dr. Patel requested that Ms. Howard return to the clinic within one week for that purpose (Appx 6a, 12/6/93, medical record entry).

Ms. Howard, however, did not return until February 28, 1994. At that time she was given a referral to nephrology (Appx 6a-7a, 2/28/94 office record of Dr. Patel). Ms. Howard began dialysis in March of 1994. Plaintiff's own expert conceded that dialysis for Ms. Howard would have been inevitable, regardless of what Dr. Patel had or had not done (Appx 25a-26a, Baskin, Tr 5/17/00, pp 86-87).

Ms. Howard's condition was under control until she was admitted to Sinai Hospital on November 11, 1995, with an elevated temperature and slurred speech. A subclavian catheter (which served as the site for connection to the dialysis machine

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during dialysis therapy) was found to be positive for an infection. Ms. Howard's condition continued to deteriorate, and she died on November 17, 1995.

Liability Theories

Plaintiff asserted that Ms. Howard died of complications of hypertension. Plaintiff's expert, Sidney Baskin, M.D., a specialist in nephrology, claimed that Dr. Patel breached the standard of practice of a family practice physician by failing to gain good control over Ms. Howard's hypertension by the right combination or right doses of hypertension medicine (Appx 14a-15a, Baskin, Tr 5/17/00, pp 38-39). Plaintiff's expert also claimed that Ms. Howard should have been referred to a nephrologist by Dr. Patel when he first saw her. The expert, Dr. Baskin, speculated that the nephrologist may have increased Ms. Howard's compliance with controlling her blood pressure through medication and diet (Appx 22a, Baskin, Tr 5/17/00, p 71). Finally, plaintiff's expert also asserted that Ms. Howard should have begun dialysis sooner, when her kidney function dropped below ten percent; Dr. Baskin could only "guess" this would have occurred by late 1993 Appx 27a-28a, Baskin, Tr 5/17/00, pp 96-98). Plaintiff claimed that absent the alleged malpractice, plaintiff would have lived longer.

It was defendants' position, on the other hand, that Dr. Patel appropriately prescribed medicine and counseled Ms. Howard, and that fluctuations in her blood pressure were due to her own noncompliance. Dr. Patel and defendant's expert, internal medicine specialist Leon Pedell, M.D., both testified that plaintiff's hypertension was appropriately controlled during the period Dr. Patel saw plaintiff (e.g., Appx 13a, Patel, 5/16/00, p 157). It was further defendants' position that Ms. Howard's history of high blood pressure for ten to 15 years before seeing Dr. Patel,

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which was so serious as to have caused her stroke which led to her admission to Sinai Hospital in 1991, severely reduced her life expectancy. It was also defendants' position that Ms. Howard's problems were due to her own noncompliance with diet and medication requirements communicated to her by Dr. Patel.

Damages Evidence

Plaintiff sought damages for loss of society and companionship sustained by Mattie Howard's seven adult children, and seven elderly sisters and brothers (identified in the jury instructions at Appx 35a, Tr 5/18/00, p 189). Ms. Howard, who at the time of her death had been nearly 69, would have had a life expectancy, if healthy, of less than 15 years (Appx 45a, plaintiff's counsel at Tr 2/6/01, p 14).

Five of the relatives on whose behalf damages were sought by the estate testified briefly at trial regarding a close relationship with Mattie Howard, including daughter Melody Scott, son Byron Howard, sister Dixie Hill, daughter Margaret Jenkins, and brother Richard Jenkins (e.g. Appx 31a, Melody Scott at Tr 5/17/00, p 130).

Defendants, on the other hand, submitted the testimony of a social worker who had seen Mattie Howard on June 10, 1994, and found her to be depressed with numerous stresses in her life. This was specifically related to her children and their behavior, as half of the children had addiction problems (Appx 33a, Joseph Alff at Tr 5/18/00, pp 17-18). Further, the daughters in August of 1994 also reported to health care providers that Ms. Howard was stressed at home and that their sisters were drug abusers (Appx 32a, Jenkins, Tr 5/17/00, p 171).

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Trial And Post-Judgment Proceedings

A jury trial was conducted from May 15, 2000 until Friday, May 19, 2000, with former Wayne County Circuit Court Judge Marianne O. Battani presiding. On May 19, the jury returned a verdict of $10,000,000. Judgment was entered on May 20, 2000 (Appx 37a).

Defendants Dr. Patel and Comprehensive Health Services filed post-judgment motions seeking application of the cap on noneconomic damages, MCL 600.1483 or, alternatively, remittitur or a new trial given the excessiveness of the verdict. In the meantime, Judge Battani left the Wayne County Circuit Court bench, having been appointed to the United States District Court for the Eastern District of Michigan. This matter was reassigned to the Honorable Gershwin A. Drain.

At a hearing held on September 29, 2000, Judge Drain agreed to read the transcript of the trial in order to rule upon the post-judgment motions (Appx 43a, Tr 9/29/00, p 8). At a hearing held on February 6, 2001, Judge Drain first held that the cap on noneconomic damages in medical malpractice actions, MCL 600.1683, did not apply to this matter because it was a wrongful death action governed by the wrongful death statute, MCL 600.2922 (Appx 44a, Tr 2/6/01, p 12).

On the question of whether the verdict was excessive under MCR 2.611, after considering the trial transcript and the parties' arguments, Judge Drain expressly found that the verdict was in fact "really excessive." Judge Drain, however, felt he was unable to determine an appropriate amount for remittitur because he had not been the trial judge, and thus denied the motion for remittitur or new trial:

> THE COURT: Okay. All right. You know, I have struggled with this case because to get right down to it, I really do think that the verdict is excessive. I think that ten million dollars in a wrongful death case is really excessive.

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But the place where I have the problem is trying to figure out exactly what's appropriate and what's reasonable and what to reduce it to in terms of this almost kind of a gut reaction of what I've read in the transcript.

And Mr. Saperstein is right, I'm really in a very awkward position here because I didn't hear the trial. I mean, I reviewed the transcript, but I didn't see the witnesses, I don't know how they came across. I didn't get the view of the trial that you all did and I just think I have an inadequate basis to really reduce something that I do even belief [sic] is excessive.

So I'm going to deny the motion for remittitur and/or new trial, and that's the decision of the Court. [Appx 46a-47a, Tr 2/6/01, pp 19-20.]

Court Of Appeals Decision

Defendants appealed, submitting both that that the noneconomic damages cap applied, and that a new trial was in any event required pursuant to MCR 2.611 and 2.630 where the successor trial judge recognized and held the verdict to be clearly excessive, but declared himself unable to determine an appropriate amount for remittitur having not presided at the trial.

In a published opinion issued on April 1, 2003, Court of Appeals (Judges William Murphy, P.J., and Jessica Cooper, with Kirsten Frank Kelly concurring in a separate opinion), held that the cap did not apply to this action alleging medical malpractice because it was brought through the mechanism of the wrongful death act.

The Court first concluded that the cap did not apply to this medical malpractice action because the noneconomic losses for which damages are allowed in a wrongful death action do not fall within the malpractice cap's definition of "noneconomic loss". (The wrongful death act allows noneconomic damages for the conscious pain and suffering of the deceased, and loss of society and companionship by the deceased's kin; the cap applies to "damages or loss due to pain, suffering, inconvenience,

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physical impairment, physical disfigurement, or other noneconomic loss." MCL 600.1683(c)(3).) The Court declared that under the doctrine of ejusdem generis, wrongful death damages could not fall within the catch-all "other noneconomic loss" because, according to the Court, the types of noneconomic damages listed in the definition--"pain, suffering, inconvenience, physical impairment, and physical disfigurement"--"clearly relate to an individual surviving plaintiff rather than damages sustained by next of kin. . ." (Appx 54a, opinion, p 7).

The Court further concluded that because the Legislature was presumed to know about the wrongful death statute when it amended the cap to eliminate the exception for death in 1993, "it was incumbent on the Legislature to specifically indicate its intent that the damages cap applied in wrongful death actions to avoid any conflict." (Appx 56a, opinion, p 9.) The Court cited no authority for its imposition of such a duty on the Legislature.

With respect to the excessive verdict issue, the Court held that the trial court was duty bound to attempt to determine an amount for remittitur under MCR 2.611. (Appx 58a, opinion, p 11.) The Court of Appeals did not address the impact of MCR 2.603, which clearly recognizes that it is acceptable for a successor judge to not be satisfied of his ability to rule on post trial matters, and provides in such a case that a new trial is a proper remedy. The Court of Appeals further held that if the trial court nonetheless could not determine an amount for remittitur, and still believed the verdict excessive, any new trial would have to be limited to damages. (Id.)

This brief is submitted by defendants Dr. Patel and Comprehensive Health Services in support of their position both that the cap on noneconomic damages

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should be applied in this action alleging medical malpractice, and that the verdict is so clearly excessive that a new trial on all issues is required.

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SUMMARY OF ARGUMENT

The Court of Appeals' ruling that the malpractice noneconomic damages cap does not apply to malpractice actions brought through the wrongful death act is clearly erroneous. The Legislature clearly and unambiguously has imposed a cap limiting the "total amount of damages for noneconomic loss recoverable by all plaintiffs" in any "action for damages alleging medical malpractice." The cap thus applies in this medical malpractice action to limit damages for loss of society and companionship, which plainly are "damages for noneconomic loss."

The fact that this claim was brought through the mechanism of the wrongful death act does not change the character of the underlying action, or exempt it from statutory provisions or limitations applicable to the underlying action. While the former, 1986 version of the cap on noneconomic loss excepted death from its scope, a two-tiered cap now applies to all claims for noneconomic loss by all plaintiffs in all medical malpractice actions, without exception for death or any other injury. The Court of Appeals' tortured construction of the wrongful death act and current cap statute by misapplication of principles of statutory construction to avoid the Legislature's clear directive should be vacated by this Court.

Further, upon the successor trial judge's determination that the verdict was clearly excessive, and that he was not capable of arriving at an amount for remittitur, a new trial as to all issues was then only fair and proper remedy. The Court of Appeals' directive that the trial court must consider remittitur, and that any new trial would be limited to damages only is clearly erroneous. The Court of Appeals' analysis fails to acknowledge and defer to this Court's pronouncement in MCR 2.630 that a successor judge properly may conclude he is unable to perform post-verdict

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duties, and that in such a case a new trial is a proper remedy. The Court of Appeals likewise erred in usurping the trial court's discretion and indicating that any new trial is to be as to damages only, where justification for such a limitation on a new trial does not exist here.

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ARGUMENT

I THE CAP ON NONECONOMIC DAMAGES APPLIES TO THE DAMAGES FOR LOSS OF SOCIETY AND COMPANIONSHIP AWARDED IN THIS ACTION ALLEGING MEDICAL MALPRACTICE; THE COURT OF APPEALS' TORTURED CONSTRUCTION OF THE WRONGFUL DEATH ACT AND CAP STATUTE TO AVOID THE LEGISLATURE'S CLEAR DIRECTIVE SHOULD BE VACATED BY THIS COURT.

The plain language of the current cap on noneconomic damages in actions for damages alleging medical malpractice, MCL 600.1483, as amended by 1993 PA 78, applies to limit the damages for loss of society and companionship awarded in this medical malpractice action. The Court of Appeals has employed various inapplicable principles of statutory construction to avoid application of the cap on the basis that this medical malpractice action was brought through the provisions of, and the jury awarded a category of noneconomic damages allowed under, the wrongful death act, MCL 600.2922. Given the plain language of the cap statute and of the wrongful death statute, as well as the history and evolution of each, the Court of Appeals has plainly misapplied principles of statutory construction to arrive at its intended result.

A. The Plain Language Of The Current Cap Statute Limits The "Total Amount Of Damages For Noneconomic Loss Recoverable By All Plaintiffs" In "An Action For Damages Alleging Medical Malpractice", And Thus Applies To Limit Damages For Loss Of Society And Companionship In This Medical Malpractice Action, Regardless Of Whether The Claim Was Brought Through The Mechanism Of Wrongful Death Act.

Where the meaning of a statute is plain and unambiguous, judicial construction is not permitted--the statute must be applied as written. Rakestraw v General Dynamics Land Systems, 469 Mich 220; 666 NW2d 299 (2003), Sun Valley Foods Co v Ward, 460 Mich 230, 236; 596 NW2d 119 (1999).

> The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins

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by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent . . . ." If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. [Sun Valley Foods Co v Ward, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted, emphasis added).]

The current cap statute as written applies to the award of damages for loss of society and companionship in this action alleging medical malpractice. No further statutory construction is required or permitted here.

(1) The cap on noneconomic damages applies to damages for loss of society and companionship which is "other noneconomic loss" within the cap's definition of "nonecomonic loss".

The cap statute, MCL 600.1483, as amended by 1993 PA 78 (Appx 68a), unambiguously applies "in an action for damages alleging medical malpractice" to limit "the total amount of damages for noneconomic loss recoverable by all plaintiffs." Recoverable damages in all actions for damages alleging medical malpractice are limited to either $280,000 or $500,000 (both annually adjusted by the Consumer Price Index), depending on whether one of three circumstances exists which the Legislature has determined warrants the higher tier cap.[1]

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[1] As further discussed below in analyzing the legislative history of the cap statute, the cap as first enacted in 1986 by 1986 PA 178, also applied to limit the amount of "noneconomic damages" in actions for damages alleging medical malpractice. (1986 version of the cap, Appx 67a). There were, however, in section one of the cap, 1483(1), also seven specified statutory exceptions identifying situations where the cap did not apply. One of the exceptions to the cap, as originally enacted, was specifically for "death". In 1993 the Legislature amended section 1 of the cap so that it now applies, without exception, to limit in any "action for damages alleging medical malpractice" the "total amount of damages for noneconomic loss" "recoverable" from "all plaintiffs." The amendment eliminated all exceptions to the cap, including the exception for death, establishing instead a two-tier limit on recoverable noneconomic damages.

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Section 1483(1) of the 1993 cap now provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (i) Injury to the brain.
>
> (ii) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

Thus the cap, either lower or higher tier, now applies to all damages for noneconomic loss by all plaintiffs in all actions alleging malpractice.

Section 1483(2) follows section 1483(1) to direct that the trier of fact in an action alleging medical malpractice "itemize damages into damages for economic loss and damages for noneconomic loss" as follows:

> (2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss. [MCL 600.1483(2), as amended by 1993 PA 78.]

After having directed in subsection 1483(2) that medical malpractice damages be categorized as either economic or noneconomic, the Legislature in subsection 1483(3) then provides a definition of "noneconomic loss" (as opposed to, and to distinguish it from the just-referenced "economic loss") as follows:

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> As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss. [MCL 600.1483(3) as amended by 1993 PA 78, emphasis added.]

Given the framework of the cap statute, the damages awarded here--for loss of society and companionship by relatives of the patient--clearly fall within the catchall provision of the cap definition of "other economic loss". As evidenced by section 1483(2), a loss for which damages are to be awarded in an action for medical malpractice obviously can only be either economic, or noneconomic.[2]

The obvious, intended function of the definition of noneconomic loss in subsection 1483(3) is to provide a basis, by way of nonexclusive example, upon which noneconomic loss can be distinguished from economic loss. The definition inclusively demonstrates that noneconomic loss includes both physical and mental injury.

There can be no question that, given that there are only two possible categories of damages in this medical malpractice action, an intangible loss of society and companionship cannot be an "economic loss" and thus, like pain, suffering and other intangible damages, must be "noneconomic loss". (The Court of Appeals does not even appear to suggest that loss of society and companionship is not "noneconomic loss.") Indeed, this Court in the context of the no fault act, and long before enactment of the cap statute, recognized that loss of society and companionship clearly is a "noneconomic loss." Rusinek v Schultz Lumber Co, 411

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[2] Numerous other provisions of the 1986 and 1993 tort reform statutes likewise recognize that damages awardable in personal injury or tort actions can only be either economic, or noneconomic, in mandating that the verdict or judgment in all

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Mich 502; 389 NW2d 163 (1981) (interpreting the no fault act's limitation on noneconomic damages, concludes that claims for loss of consortium, including loss of society, are claims for noneconomic loss.) Thus the cap, by its plain language applies to damages for loss of society and companionship.

(2) This is an action alleging medical malpractice, to which the cap applies, notwithstanding that it was brought through the mechanism of the wrongful death act.

The fact that this is an action brought through the procedural mechanism of the wrongful death or survival acts, MCL 600.2921, MCL 600.2922 (Appx 69a, 70a) does not in any way change the fundamental character of this action as claim for medical malpractice. As a claim for malpractice it is thus subject to the noneconomic damages cap.

MCL 600.2921, commonly known as the survival act, initially provides that all actions for personal injuries after death must be brought through MCL 600.2922, commonly known as the wrongful death act:

> All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section [MCL 600.2922]. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

The next section, MCL 600.2922, provides, in pertinent part, for the prosecution of personal injury actions which could have been pursued before death by the personal representative after death. It also specifies the categories or elements of damages, both economic and noneconomic, recoverable by the estate:

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such actions delineate the award between these two categories damages. See e.g. MCL 600.6305, MCL 600.6306.

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> Sec. 2922. (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony.
>
> * * *
>
> (6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

As this Court recognized in the seminal decision of Hawkins v Regional Medical Laboratories, PC, 415 Mich 420, 436; 329 NW2d 729 (1982), although it is the "exclusive remedy" for tort actions after death, the wrongful death act is merely a procedural mechanism by which to bring a tort claim for injuries resulting in death which otherwise would have been destroyed at death. The death act does not create a new cause of action. The underlying liability theory must still be recognized and its requirements met before recovery is allowed.

In Hawkins the Court held that alleging medical malpractice is subject to the statute of limitations applicable to medical malpractice claims. The Court held that there is no new cause of action arising at the time of death:

> The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called "death act," MCL 600.2922; MSA 27A.2922, does not change the character of such actions except to expand the elements of damage available. [Id. at 436 (emphasis supplied).]

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See also Hardy v Maxheimer, 429 Mich 22; 116 NW2d 299 (1987), in which the Court followed Hawkins to reject the long and contentious distinction between instantaneous death and survival actions, and also conducted a detailed analysis of the history of wrongful death actions.

The fact that plaintiff's claims were brought through the mechanism or "filter" of the wrongful death act, MCL 600. 2922, does not change the fundamental nature of the allegations here, which sound in medical malpractice. While the wrongful death act in MCL 600.2922(6) identifies the categories or elements of damages awardable in a death action, which include some categories not otherwise recoverable at common law, it does not change the inherent nature of the underlying tort action.

Plaintiff's reliance below on cases regarding the exclusive right of the personal representative to bring an action for damages, such as Burns v Van Laan, 367 Mich 485; 116 NW2d 873 (1962), and Courtney v Apple, 345 Mich 223, 228; 76 NW2d 80 (1962), was misplaced. There, the Court held that the Wrongful Death Act is the exclusive mechanism by which to bring such a claim, and that family members have no claim outside the act. Here, however, the issue is not who may bring the claim or how such a claim may be brought. Rather, the issue here is whether the cap applies to this action for damages alleging medical malpractice.

This action continues to be an action alleging malpractice and, therefore, subject to the cap. The wrongful death act by its own terms does not prevent the application of other common law or statutory provisions which limit the amount of damages actually recoverable by the estate.

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B. The Court of Appeals Erred In Concluding That The Cap's Definition Of "Noneconomic Loss" Contains "Express Language" That Indicates The Cap "Does Not Apply In Wrongful Death Actions" Under The Doctrine Of "Ejusdem Generis."

The Court of Appeals' struggle to apply the doctrine of ejusdem generis to find "express language" in the cap statute excluding from the cap noneconomic damages recoverable in wrongful death actions is fundamentally flawed.

Under the doctrine of "ejusdem generis" if "general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Koester v City of Novi, 458 Mich 1, 21, n1; 580 NW2d 835 (1998). In Weakland v Toledo Engineering Co, Inc, 467 Mich 344, 350; 656 NW2d 175 (2003), cited by the Court of Appeals, this Court concluded that the phrase "dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus" and "other appliances" in MCL 418.315(1), did not include a van. The Court so concluded because the specific items share a commonality in that they are artificial adaptive aids that serve to directly ameliorate the effects of the medical condition.

The Court of Appeals applied this doctrine here to exclude wrongful death noneconomic damages from the cap by asserting that the types of noneconomic damages listed in the definition in section 1483(3) before the catchall--"pain, suffering, inconvenience, physical impairment, and physical disfigurement"--"are not of the same 'kind, class, character or nature' as those associated with the wrongful death action." (Appx 55a, opinion, p 8.) The Court of Appeals' analysis is clearly in error on several levels.

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(1) The doctrine of "ejusdem generis" should not be applied here as the plain meaning of "noneconomic loss" necessarily includes loss of society and companionship, further statutory construction is unnecessary, and a contrary conclusion is inconsistent with the evident intent of the cap statute as a whole.

As evidenced by the glaring flaws in the Court of Appeals analysis set forth below, defendants submit that the ejusdem doctrine simply is not applicable here with respect to limiting the types of noneconomic loss to which the cap applies. Courts are not at liberty to depart from the plain language of a statute by purporting to apply the doctrine of ejusdem generis whenever the Legislature chooses to list various actions, conditions, peoples, places, or other things in a statute. The first step in interpreting a statute is to look at the "common and approved usage" of the words in question. People v Jacques, 456 Mich 352, 354; 572 NW2d 195 (1996). Only if the plain language, the common and approved usage, is not evident, and the statute is therefore ambiguous, may resort be had to the ejusdem doctrine. Id., 354-355.

In In re Mosby, 360 Mich 186, 192; 103 NW2d 462 (1960), the Court explained that the ejusdem doctrine is not applicable in all cases:

> The rule of ejusdem generis is not to be invoked in every case where general words follow (or possibly precede) specific words. For example, it applies only where the specific words relate to subjects of a single kind, class, character, or nature, as noted above. In all events, the rule is useful only for the purpose of aiding the judicial search for the sometimes elusive scrivener's intent. Where the language used, considered in its entirety, discloses no purpose of limiting the general words used, the rule of ejusdem generis may not be invoked to defeat or limit the purpose of the enactment. People v O'Hara, 278 Mich 281, and Utica State Savings Bank v Village of Oak Park, 279 Mich 568. [Emphasis added.]

In Mosby, the Court declined to apply the doctrine where it did not appear that the list of causes for disciplinary action was intended to limit the power to discipline, and the

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contrary intent was evident from the language of the omnibus clause, language which reserved to the appointing authority powers granted by the Legislature.

Defendants submit that the doctrine does not apply here. First, as noted above, under long-established common and approved usage, the term "noneconomic loss" includes loss of society and companionship, the only damages awarded here. Rusinek v Schultz Lumber Co, 411 Mich 502; 389 NW2d 163 (1981) (interpreting the no fault act's limitation on noneconomic damages, concludes that claims for loss of consortium, including loss of society, are claims for noneconomic loss.) Therefore there is no ambiguity and no need to resort to a doctrine of statutory construction.

Second, the catch all "other noneconomic loss" is the same phrase as is being defined ("noneconomic loss"); the list of damages within the definition clearly are intended to be by way of example of noneconomic loss and not by way of limitation of types of noneconomic loss. In contrast to Weakland, which listed several items and only then concluded with a catch all ("other appliances"), the statute here begins with the term "noneconomic loss," lists several examples of "noneconomic loss," and then concludes with an express intent to also include "other" noneconomic loss.

Further, within the context of the statute as a whole, this definition in subsection 1483(3) obviously is not intended to distinguish among or exclude any particular kind of noneconomic damages. Rather, the definition inclusively defines noneconomic losses to include losses of both a mental and physical nature. In the context of the statute as a whole, this definition section is obviously intended to encompass losses of both a mental and physical nature, and to distinguish those from "economic damages" referenced in the immediately preceding subsection MCL 1483(2) (directed that noneconomic damages be separated by the trier of fact from

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economic damages). There is no ambiguity and no need or justification for applying the doctrine of ejusdem generis.

(2) The Court of Appeals is in error in asserting that the damages referenced by the cap definition of "noneconomic loss" are of a different type than those recoverable under the wrongful death act.

The Court of Appeals' premise for application of the ejusdem doctrine--its assertion that the specified damages preceding "other noneconomic loss" in section 1483(3) "are not of the same kind, class, character or nature as those associated with a wrongful death action" --is simply wrong. Several of the categories of damages expressly listed in both statutes are in fact identical.

The wrongful death act allows recovery for damages for noneconomic loss sustained by the decedent ("pain" and "suffering"), and for damages sustained by the decedent's relatives for both economic loss (loss of financial support) and noneconomic loss (loss of society and companionship), for:

> the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [MCL 600.1483].

The cap on the other hand in subsection 1483(1) applies to "the total amount of damages for noneconomic loss recoverable by all plaintiffs," and in subsection 1483(3) defines "noneconomic loss" to "mean damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." MCL 600.1483(3).

At least two categories of damages listed in the wrongful death act and the noneconomic damages definition expressly overlap and are identical. Both statutes refer to damages for "pain," and damages for "suffering." Thus, on its face, the

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damages in the cap definition are in fact of the "same kind, class, character or nature as those associated with" a wrongful death action![3]

Second, the Court of Appeals' declaration that "damages and losses" for "society and companionship" as referred to in the death act is a loss or damage "unique to relatives of a person who has died", and thus unique to death actions (Appx 54a, opinion, p 7), is also simply wrong. Damages for "loss of society and companionship" are not of a nature unique to wrongful death actions, but are also commonly recoverable in many personal injury actions.

As noted by the Court of Appeals, within the context of a death action, a claim for "loss of society and companionship" has been noted to mean "compensation for the destruction of family relationships that results when one family member dies." McTaggart v Lindsey, 202 Mich App 612; 509 NW2d 881 (1993), citing Crystal v Hubbard, 414 Mich 297; 324 NW2d 869 (1982). Loss of society and companionship damages are not unique to death claims. Loss of society and companionship is a well recognized component of loss of consortium claims, certainly among the most commonly claimed damages in all tort actions. Loss of consortium includes "loss of society, companionship, service, and all other incidents of the marriage relationship".

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[3] Without merit is the Court of Appeals citation in footnote 6 to the Michigan Model Civil Jury Instruction concerning wrongful death damages, M Civ JI 45.02. The Court apparently believed this supported some sort of meaningful and dispositive distinction between "conscious pain and suffering", referred to in the wrongful death instruction, and "pain and suffering" as referred to in the non-wrongful death damages instructions. The Model Civil Jury Instruction Committee, while certainly an august and well respected body now appointed by this Court, is not empowered to either create or alter the statutory or common law, see MCR 2.516(D). Further, the instructions could not possibly support the absurd proposition that there is a distinct, and recoverable category of damages for "unconscious" pain and suffering outside of the death act.

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Kailimai v Firestone Tire Co (On Remand), 87 Mich App 144; 273 NW2d 906 (1978), quoting Washington v Jones, 386 Mich 466; 192 NW2d 234 (1972), Berger v Weber, 411 Mich 1; 303 NW2d 424 (1979), Rusinek v Schultz Lumber Co, 411 Mich 502; 389 NW2d 163 (1981) ("Consortium is defined as including 'society, companionship, service, and all other incidents of the marriage relationship'.")

Moreover, damages for loss of society and companionship are in fact recoverable by nonspouses outside of the death act in personal injury and malpractice actions. Such damages specifically are recoverable by children of parents arising out of injuries to those parents. Berger v Weber, 411 Mich 1; 303 NW2d 424 (1979).

Accordingly, there is no meaningful distinction between the kind of noneconomic damages listed in the cap, and those listed in the wrongful death act.

(3) The Court of Appeals' apparent conclusion that the cap noneconomic damages definition applies only to a living individual patient/plaintiff violates the cap directive that it applies to pain and suffering, and that it applies to "all plaintiffs", and further produces an absurd result.

The Court of Appeals' reasoning also suggests that it believes that the cap definition of noneconomic applies only to damages "sustained by an individual surviving plaintiff," as opposed to those sustained by relatives or, apparently, the deceased (Appx 54a, opinion, p 7). This is an impermissible application of the ejusdem doctrine because it would necessarily preclude application of the cap to claims for pain and suffering of the deceased. This is contrary to the express language of the cap definition explicitly referencing "pain" and "suffering." See In re Mosby, supra.

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This analysis likewise apparently would preclude application of the cap to all derivative claims for damages by relatives of a living plaintiff/patient, such as a spouse's claim for loss of consortium, or a child's claim for loss of society and companionship for injury to a parent. However, this is contrary to the explicit directive of the cap statute, and would produce an absolutely absurd result.

First, to preclude application of the limitation on noneconomic damages to anyone except the single plaintiff/patient who was directly injured by the malpractice is directly contrary to the express language of the cap directing that the cap applies to "the total amount of damages for noneconomic loss by all plaintiffs . . . " MCL 600.1483(1) (emphasis supplied). Since a medical malpractice action involves direct injury to one person, the patient, "all plaintiffs" must refer to family members who would recover for indirect or derivative losses, such as loss of consortium or loss of society and companionship. To conclude otherwise would render the explicit phrase "all plaintiffs" meaningless, contrary to established principles of statutory construction. "The courts should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory." Amburgey v Sauder, 238 Mich App 228, 232; 605 NW2d 84 (1999).

Further, to hold that the cap applies only to a single living plaintiff, and not to a plaintiff estate or to other plaintiffs who are relatives of the patient, would also produce an obviously absurd result. That is, by this reasoning, a severely, directly injured patient's claim would be limited by the cap, while the more remote, less direct injuries asserted in derivative claims by relatives would not be subject to the cap. While the Legislature could have intentionally by clear language insisted upon such

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an illogical and absurd result, it did not do so here, and such cannot legitimately be implied by way of strained statutory construction.

The Court of Appeals' analysis also makes no sense in light of the fact that the Legislature initially included death as an exception in the 1986 act which contained this same definition of "noneconomic loss." If the definition of noneconomic loss in subsection 1483(3), which is substantively the same in both the 1986 and 1993 versions,[4] were intended to exclude all death damages, there would have been no need or purpose for including "death" as an exception to the 1986 cap in the first instance in subsection 1483(1). The "death" exception in the 1986 version of subsection 1483(1) would then impermissibly be rendered mere meaningless surplusage. Amburgey v Sauder, 238 Mich App 228, 232; 605 NW2d 84 (1999). To the contrary, it must be concluded that the Legislature clearly understood and intended that death damages would otherwise be covered by the cap definition unless they were excepted.

Finally, the Court of Appeals' assertion that "without specific direction from the Legislature, we are not prepared to say that the Legislature intended to place an equal or lesser value on a person's life" (Appx 56a, opinion, p 9), ignores the fact that recovery is not had in any death action for the "value of a person's life." Rather, recovery related to the loss of life is had only for loss of society and companionship

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[4] The 1986 version of section 1983(3) was only slightly different from the 1993 version, providing:

> "Noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

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by relatives due to the loss of a relationship with the deceased. This, as noted, is a damage element which is not unique to death actions, and which the Supreme Court has acknowledged to be indirect and remote. See Sizemore v Smock, 430 Mich 283; 422 NW2d 666 (1988). Indeed, in the case of death, it is a damage which was not even recoverable at common law, and which was not recoverable under the death act until relatively recently. See also Hardy v Maxheimer, 429 Mich 22; 116 NW2d 299 (1987).

Accordingly, the Court of Appeals' assertion that the specified damages preceding "other noneconomic loss" in section 1483(3)--pain, suffering, inconvenience, physical impairment, physical disfigurement--"are not of the same kind, class, character or nature as those associated with a wrongful death action," is simply wrong. Thus, the ejusdem doctrine is neither applicable nor of assistance in statutory interpretation.

C. Contrary To The Court Of Appeals' Assertion, The Cap Does Not Impermissibly Conflict With The Wrongful Death Act When Applied To Limit Recoverable Loss In Wrongful Death Actions.

The Court of Appeals' assertion that if the cap applied to loss of society and companionship and other "standard wrongful death damages," the cap statute would impermissibly conflict with and necessarily be superceded by the wrongful death act (Appx 55a-57a, opinion pp 8-10, and footnotes 8-11), is without merit.

(1) The cap and wrongful death act do not conflict.

First, contrary to the Court of Appeals' assertions in footnotes 8 through 11 and accompanying text, there is in fact no "conflict" between the wrongful death act, MCL 600.2922(6), and the cap provision of the 1993 tort reform act, 1993 PA 78. The wrongful death act generally provides that "the court or jury may award damages

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as the court or jury shall consider fair and equitable." MCL 600.1483 does not limit fact finding by the trier of fact as to the award of fair and equitable damages; rather it specifically limits the "total amount recoverable" in any action alleging medical malpractice. An analogous distinction was made by the Court in Zdrojewski v Murphy, 254 Mich App 50; 235 NW2d 814 (2002), in upholding the constitutionality of the cap:

> The right to a jury trial includes the right to have damages determined by a jury. Leary v Fisher, 248 Mich 574, 578; 227 NW 767 (1929). However, in certain circumstances, a trial court may reduce a jury verdict without violating the right to a jury determination of damages. Id. (trial court may order a new trial unless a plaintiff agrees to accept a reduced verdict); Heinz v Chicago Road Investment Co, 216 Mich App 289, 299-300; 549 NW2d 47 (1996) (statute requiring that a jury damage award be reduced by the amount a plaintiff receives from a collateral source does not violate the right to a jury trial).
>
> Although our Court has not addressed whether MCL 600.1483 violates the right to a jury trial, a panel recently addressed the constitutionality of an analogous provision of MCL 257.401(3). In Phillips v Mirac, Inc, 251 Mich App 586; 651 NW2d 437 (2002), the panel held that a statutory damages cap imposed by MCL 257.401(3) does not violate a plaintiff's right to a jury trial for two reasons. The panel first noted that the Legislature has the authority "to abolish or modify common law and statutory rights and remedies." Id. at 592. In addition, the panel concluded that MCL 257.401(3) "does not impinge on a jury's right to decide cases" because the damages cap "in no way removes from the jury the determination of the facts and of the amount of damages . . . incurred." Id. at 594. "In other words, [MCL 257.401(3)] only limits the legal consequences of the jury's finding. Once the jury has reached its verdict, the trial judge merely enters a judgment on the verdict that is consistent with the law." Id. (Citations omitted.)
>
> The reasoning in Phillips is equally applicable to the facts of this case and the requirements of MCL 600.1483. Plaintiff was able to try this case in front of a jury that rendered a verdict awarding plaintiff damages. Because MCL 600.6304(5) prohibits the trial court from informing the jury of the noneconomic damages limitation of MCL 600.1483, the jury rendered its damage award based on the facts of the case, unaware of the statute's limitation. [Zdojewski v Murphy, supra, footnotes omitted.]

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As the Court noted in Zdrojewski, MCL 600.6098 makes clear that the application of the cap is a function of the court only after the verdict or award has been made. Clearly evidencing the Legislature's intent that the cap apply to limit damages recoverable in a medical malpractice action, regardless of the amount of damages awarded by the court or jury as factfinder, MCL 600.6098 provides:

> A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

Similarly, MCL 600.6304, in addressing the allocation of liability in actions "based on tort or on other legal theories seeking damages for personal injuries, property damage, or wrongful death" directs that the court is to reduce the damages award by the jury.

Other statutory and common law limitations on the amount of damages recoverable under the underlying tort theory, like the cap, continue to apply to death actions. Statutory and common law limitations on damages, such as comparative negligence, have been declared applicable to wrongful death actions, despite the absence of a specific reference to such limitations in the wrongful death act. Rogers v City of Detroit, 457 Mich 125 (1998) ; 579 NW2d 840 (1998) overruled on other grounds, Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000) (statutory collateral source deduction applied to reduce wrongful death award), Byrne v Schneider's Iron and Metal, Inc, 190 Mich App 176, 189; 475 NW2d 854 (1991) (holding that parents' comparative negligence reduces recovery under wrongful death statute in action for death of child).

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There thus is no conflict between the wrongful death act and the provisions governing medical malpractice actions in 1993 PA 78.

(2) Even if the cap statute and wrongful death act "conflict," the malpractice cap, as the more specific and more recent statute, governs.

In any event, it is absolutely clear that even if the cap limitation of the amount of damages "recoverable" in actions alleging medical malpractice in 1993 PA 78 did conflict with or were inconsistent with the wrongful death act, the former clearly supercedes or limits the scope of the latter. The plain language of the cap and principles of statutory construction applicable when there is a claim of conflict between statutes provide ample basis upon which to divine the Legislature's intent.

Michigan law is well and long established that when interpreting a statute, a more specific enactment of the Legislature is controlling to the extent of any inconsistencies with a more general enactment. Jones v Enertel, Inc, 467 Mich 266; 650 NW2d 334 (2002), Gebhardt v O'Rourke, 444 Mich 535, 542-543; 510 NW2d 900 (1994). When two statutes apply to the same subject, they must be construed together to give meaning to both if possible. Bauer v Dep't of Treasury, 203 Mich App 97; 512 NW2d 42 (1994). If the enactments conflict, the special statute prevails even if enacted before the general statute. Id.

Under closely analogous circumstances, the Court of Appeals in Travelers Insurance v U-Haul, 235 Mich App 273; 597 NW2d 235 (1999), considered the question of which act governed, where the owner's liability act imposed liability on a motor vehicle owner for injury broader than that allowed by the no-fault act. The Court held that because the no-fault act was the more recently enacted, and the more specific of the two, it controlled. The Court reasoned:

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> Whereas the owner's liability act provides for the owner's liability for injury to person or property without restriction (as long as the plaintiff shows consent and negligence) the no-fault act clearly and unambiguously abrogates tort liability arising from ownership of a motor vehicle, except for noneconomic damages satisfying the threshold requirement. Consequently, we find that the statutes conflict to the extent that liability under the owner's statute is broader than the residual tort liability left by the no-fault act. There is simply no way to countenance the full extent of liability contemplated by the owner's statute without leaving a gaping hole in the no-fault act's scheme of replacing tort-based compensation with no-fault insurance. See Shavers, supra, 579.
>
> The no-fault act is more recent than the owner's liability act, and thus takes precedence. Malcolm, supra, 139; National Center for Manufacturing Sciences, supra, 549. Furthermore, the no-fault act has a more specific application. Whereas the owner's liability act filled a gap in the common law by allowing recovery against owners of motor vehicles, Wieczorek, supra, 148; the no-fault act replaced, to a large extent, the tort-based system of compensation with a no-fault insurance scheme. [citations omitted] Under our rules of statutory construction, we conclude that the no-fault act "trumps" the owner's liability act and that actions under the latter are permissible only where allowed under §3135. [Travelers Insurance v U-Haul, supra, 284-285.]

Similarly in this context, the wrongful death act effectively filled the gap in the common law by allowing recovery of damages for death, where such a cause of action and such damages were not allowed under common law. The 1993 Tort Reform Act then modified, to a large extent, the procedure and permissible remedy for a single, narrow, very specific type of tort action, that alleging medical malpractice.

The cap and accompanying legislation in 1993 PA 78 clearly were more specific than the death act. 1993 PA 78 was directed virtually exclusively to medical malpractice actions, implementing extensive substantive and procedural changes to govern that very specific category of tort action, regardless of whether the claim was brought through the mechanism of the wrongful death act. All of the pertinent "tort reform statutes" enacted or revised in 1993 along with the revisions to the cap in 1993 PA 78, applied to "an action alleging medical malpractice", without specific

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reference to whether it is a claim involving personal injury or wrongful death. See MCL 600.2912a (burden of proof), MCL 600.2912b (notice of intent), MCL 600.2912d (affidavit of merit), MCL 600.2912(e) (affidavit of meritorious defense), MCL 600.2912f (waiver of privilege), and MCL 600.2169 (qualifications of expert witness). There certainly is no question that all of these provisions do apply to actions alleging medical malpractice which are brought under the Wrongful Death Act.

The provisions of the 1993 Tort Reform Act, including the cap, clearly "trump" the wrongful death act; damages recoverable under the latter are permissible only where they do not exceed those recoverable under the cap applicable to the specific category of medical malpractice actions.

The Court of Appeals cites no authority for its assertion that because the Legislature should have been aware of the damage award provisions of the wrongful death act, it was "incumbent" on the part of the Legislature to specifically indicate its intent that the damages cap applied in wrongful death actions in order for the cap to apply (slip opinion, p 9). As noted above, it is entirely permissible and common to enact inconsistent legislation which does not expressly reference the statutes with which it conflicts; the more specific statute simply prevails.

Moreover, in MCL 600.6304, the Legislature has in fact effectively indicated its intent that the cap apply in death actions. MCL 600.6304 addresses the allocation of liability in actions "based on tort or on other legal theories seeking damages for personal injuries, property damage, or wrongful death", and in subsection five specifically addresses medical malpractice actions, providing:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall

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instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

(5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).* * *

Clearly the Legislature has viewed medical malpractice actions as a very specific subset of actions for personal injury or death. See also MCL 600.2925, in which the Legislature in subsection (1) addresses expert testimony in "an action for

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the death of a person or for injury to a person or property," and then provides a further limitation in medical malpractice in subsection (3), clearly indicating that the Legislature views malpractice actions as a specific subset of actions "for the death of a person or for injury to a person or property." Similarly, contrast MCL 600.5805(5) referencing actions for malpractice, which has been held to apply in death actions, Hawkins v Regional Medical Laboratories, supra, and MCL 600.5805(10), referencing the statute of limitations for other actions for injury or death.

Accordingly, even if the cap and wrongful death statutes conflict, the cap statute, as the more specific and recent, governs.

D. Contrary To The Court Of Appeals' Assertion, The Legislative History Of The Cap--Including The Legislature's Removal Of The Prior Exception For Wrongful Death Actions--And Its Relation To Other Tort Reform Statutes Clearly And Conclusively Establishes The Legislature Intended This Cap To Apply To Wrongful Death Actions.

Even if the cap statute is ambiguous (which defendants deny), every aspect of the legislative history of the cap statute reflects that the current cap applies to actions alleging medical malpractice brought through the mechanism of the wrongful death act. First, a comparison of the current 1993 version of the cap with the prior 1986 version of the cap makes it clear that the current version of the cap applies to malpractice actions brought pursuant to the wrongful death act. As noted above originally enacted, section 1483 provided for a cap on noneconomic damages recoverable in medical malpractice actions, with seven exceptions to which the cap would not apply. One of those exceptions provided that the prior version of the cap **would not apply** in cases in which "there has been a death." Section 1483(1)(a).

Section 1 of the 1986 cap provided:

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Sec. 1483. (1) in an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more the of the following circumstances exist:

(a) There has been a death.

(b) There has been an intentional tort.

(c) A foreign object was wrongfully left in the body of the patient.

(d) The injury involves the reproductive system of the patient.

(e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.

(f) A limb or organ of the patient was wrongfully removed.

(g) The patient has lost a vital bodily function. [Emphasis added, see Appx 67a, prior version of section 1483.]

As noted above, subsections 2 and 3 of the 1986 cap were substantively the same as the current version, providing:

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into economic and noneconomic damages.

(3) "Noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

In the 1993 version of the cap, the Legislature eliminated all exceptions, including death and provided for a cap on all actions alleging medical malpractice providing for a higher cap amount in the case of permanent functional loss of a limb, permanently impaired cognitive capacity, or permanent loss of or damage to a reproductive organ.

Thus, contrary to the Court of Appeals' contention, the fact that the Legislature eliminated the exception for death which existed in the 1986 Act does not mean that the cap now does not apply to wrongful death actions at all. Rather the elimination of

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the exception obviously means that the Legislature intended to bring actions in which there has been a death back within the scope of the cap. If the Legislature has considered and rejected proposed statutory language, the language adopted should not be construed to include what the Legislature has already rejected. In re MCI Communications Complaint, 460 Mich 396; 596 NW2d 164 (1999).

Aside from the evolution of the plain language of the cap statute itself, there is extensive legislative history which confirms that the Legislature understood and intended that the 1993 cap would apply to wrongful death actions. The Court of Appeals' tortured and illogical analysis in footnote 8 of its opinion notwithstanding, it is clear that all concerned in passage of the 1993 act believed and/or intended that the cap would apply to death.

As conceded by the Court of Appeals, "Senate and House Journal entries do in fact indicate multiple attempts to include death as an exception" to the lower tier cap (proposed variously to be $250,000, $350,000, $375,000 or $280,000), and thus subject to the higher tier cap (see Appx 109a, 1993 Journal of the Senate, p 274, (Appx 90a, 92a-94a, 96a, 1993 Journal of the House, pp 953, 993-995, 1007, cited by the Court of Appeals in footnote 8, but attributed to the incorrect Journal). In 1995, another effort was again made to except death from the lower cap, 1995 House Journal, p 1061 (Appx 128a). All of these attempts were defeated. As noted above, if the Legislature has considered and rejected proposed statutory language, the language adopted should not be construed to include what the Legislature has already rejected. In re MCI Communications Complaint, 460 Mich 396; 596 NW2d 164 (1999).

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The Journals also record "protests" by various legislators also vehemently objecting to the 1993 act on the basis that the cap would now apply to wrongful death actions (e.g. Appx 115a, 1993 Senate Journal, pp 280, Appx 123a-126a, 1993 Senate Journal 1773, 1774, 1775). While such commentary is not necessarily persuasive for purposes of statutory construction because it is only one legislator's gratuitous comments, see Frank W Lynch & Co v Flex Technologies, 463 Mich 578; 624 NW2d 180 (2001), it serves as confirmation of the common sense conclusion that by eliminating death as an exception, the cap would apply to death claims.

The Court of Appeals' citation to other tort reform provisions enacted at other times which do specifically reference loss of society and companionship or death provides no support for the Court's conclusion. The other statutes, MCL 600.2945, 600.2969, and 600.2970 were enacted as part of the 1995 tort reform acts, 1995 PA 61 and 249. The 1995 acts covered a broad array of product liability and personal injury actions. That the Legislature chose to reference death or loss or more types of noneconomic loss that it had under another different act provides no basis upon which to ignore the plain language of the 1993 act with regard to actions alleging medical malpractice.

Accordingly, the cap on noneconomic damages applies to this action for damages alleging medical malpractice, and the Court of Appeals' tortured construction of the wrongful death act and cap statute to avoid the Legislature's clear directive should be vacated by this Court.

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II GIVEN THE EXPRESS DETERMINATION BY THE SUCCESSOR TRIAL COURT JUDGE THAT THE VERDICT WAS CLEARLY EXCESSIVE, BUT THAT HE COULD NOT DETERMINE THE APPROPRIATE AMOUNT FOR REMITTITUR BECAUSE HE HAD NOT PRESIDED AT TRIAL AND VIEWED THE WITNESSES, THE COURT OF APPEALS SHOULD HAVE REMANDED FOR A NEW TRIAL ON ALL ISSUES.

The verdict in this wrongful death medical malpractice action of 10 million dollars in noneconomic damages for the loss of society and companionship by the elderly siblings and adult children of Ms. Howard, a 68-year-old single woman with serious preexisting medical problems, was clearly excessive. The trial court judge, in an appropriate exercise of discretion, specifically so held in ruling on defendants' post judgment motions.

The trial court then erred, however, in refusing to grant defendants any relief because the judge, as a successor judge, felt incapable of determining an appropriate amount for remittitur because he had not presided at the trial and viewed the witnesses. Under these circumstances, the only fair, equitable and lawful course of action was the granting of a new trial, as specifically envisioned by MCR 2.630.

The Court of Appeals erred in rebuking the trial court for determining he was not capable of determining remittitur, a determination completely permissible under MCR 2.630. The Court of Appeals also erred in directing that if a new trial were to be granted, it should be limited to damages only. A new trial as to all issues should be ordered by this Court.

A. Standard Of Review.

A trial court's determination of the excessiveness of the verdict for purposes of granting remittitur or a new trial is reviewed for an abuse of discretion. Palenkas v Beaumont Hospital, 432 Mich 527, 533; 443 NW2d 354 (1989). Here, however, it is

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not the trial court's determination of the excessiveness of the verdict which is at issue--the successor trial court judge found the verdict clearly excessive, a determination with which defendants fully agree.

The action of which review is sought is the successor trial court judge's refusal to act because he felt unqualified to determine an appropriate amount for remittitur. Where the rules clearly direct that a new trial is a proper remedy for an excessive verdict, MCR 2.611, or where a successor judge feels unable to fulfill the duties of the trial, MCR 2.630, defendants submit that the standard of review should be that of an error of law, which is reviewed de novo. Heinz v Chicago Road Investment Co, 216 Mich App 289; 549 NW2d 47 (1996). However, under either an abuse of discretion or de novo standard, the grant of a new trial is required.

B. Upon The Express Determination That The Verdict Was Clearly Excessive, The Successor Trial Court Judge Should Have Granted A New Trial Pursuant To MCR 2.611 And MCR 2.630.

The successor judge, after reviewing the record in this matter and in the proper exercise of his discretion came to the only possible, rational conclusion--the verdict in this case was patently excessive. Judge Drain declared:

> You know, I have struggled with this case because to get right down to it, I really do think that the verdict is excessive. I think that ten million dollars in a wrongful death case is really excessive. [Appx 46a, Tr 2/6/01, p 19.]

MCR 2.611(E) provides that if the trial court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, the court may grant remittitur--a denial of a motion for new trial upon the condition that nonmoving party consents to the highest verdict the evidence will support. On the other hand, MCR 2.611 also expressly provides for the grant of a new trial where there has been an award of

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"excessive or inadequate damages appearing to have been influenced by passion or prejudice," or a "verdict clearly or grossly inadequate or excessive." MCR 2.611(A)(1)(c) and (b).

Judge Drain, however, felt unqualified to determine an appropriate amount for remittitur because he had not been the trial judge and had not had the opportunity to see the witnesses:

> [The Court:] But the place where I have the problem is trying to figure out exactly what's appropriate and what's reasonable and what to reduce it to in terms of this almost kind of a gut reaction of what I've read in the transcript.
>
> And Mr. Saperstein [plaintiff's counsel] is right, I'm really in a very awkward position here because I didn't hear the trial. I mean, I reviewed the transcript, but I didn't see the witnesses, I don't know how they came across. I didn't get the view of the trial that you all did and I just think I have an adequate basis to really reduce something that I do even belief [sic] is excessive.
>
> So I'm going to deny the motion for remittitur and/or new trial, and that's the decision of the Court. [Appx 46a-47a, Tr 2/6/01, pp 19-20.]

Defendants submit that upon Judge Drain's finding that the verdict was "really excessive", but that he was unable to determine an amount for remittitur under MCR 2.611(E), the grant of a new trial was required. Pursuant to the directive of MCR 2.611(A)(c) and (b), providing for the grant of a new trial, and MCR 2.630, governing the responsibilities of a successor trial judge when unable to perform the duties prescribed by the court rules, the grant of a new trial was the only appropriate, fair and essentially mandated, remedy.

While remittitur is an option where the trial judge finds the amount of the verdict to be the only error, and does require a determination of the highest amount the evidence will support, it is not the only remedy for an excessive verdict provided for by the rules. MCR 2.611(A)(1)(c) and (b) also expressly provide for the grant of a

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new trial where there has been an award of "excessive or inadequate damages appearing to have been influenced by passion or prejudice," or a "verdict clearly or grossly inadequate or excessive."

Indeed, the successor judge's belief that the fact that he had not been the trial judge made it too difficult for him to arrive at an amount for remittitur, was all the more reason why a new trial should have been granted. MCR 2.630 specifically provides that where, as here, a substitute judge feels unable to perform the duties prescribed by the court rules, a new trial may be granted. MCR 2.630 provides:

> If, after a verdict is returned or findings of fact and conclusions of law are filed, the judge before whom an action has been tried is unable to perform the duties prescribed by these rules because of death, illness, or other disability, another judge regularly sitting in or assigned to the court in which the action was tried may perform those duties. However, if the substitute judge is not satisfied that he or she can do so, the substitute judge may grant a new trial. [Emphasis added.]

Here, by virtue of Judge Drain's stated inability to determine an appropriate amount of remittitur because he was not the trial judge, combined with his express determination that the verdict was in fact excessive, a new trial was the only appropriate and logical remedy. Although rule 2.630 states that a successor trial judge who is unable to perform the judicial duties under the rules "may" grant a new trial, that was necessarily a mandate here.

C. MCR 2.630 Clearly Empowers A Successor Trial Court Judge To Decline To Make A Remittitur Determination Under These Circumstances, And The Trial Court Here Should Not Be Compelled By The Court Of Appeals To Do Otherwise.

The successor judge's stated inability to arrive at an amount for remittitur is not improper, but is clearly contemplated by MCR 2.630 which provides that the trial court must then grant a new trial. Defendants request that this Court hold that the

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trial judge is not required to make a post-verdict remittitur determination where he has already indicated he is not able to do by virtue of his successor judge status.

This is specifically the type of difficulty contemplated by MCR 2.630, which was relied upon by defendants, but which is not addressed by the Court of Appeals in its opinion. MCR 2.630 specifically anticipates that a successor judge may not feel comfortable in making post-trial rulings, not having been present at trial. The appropriate remedy is not for an appellate court to require the judge to make the challenged determination, but to remand for the grant of a new trial. MCR 2.630 provides:

> If, after a verdict is returned or findings of fact and conclusions of law are filed, the judge before whom an action has been tried is unable to perform the duties prescribed by these rules because of death, illness, or other disability, another judge regularly sitting in or assigned to the court in which the action was tried may perform those duties. However, if the substitute judge is not satisfied that he or she can do so, the substitute judge may grant a new trial. [Emphasis added.]

Here, by virtue of Judge Drain's stated inability to determine an appropriate amount of remittitur because he was not the trial judge, combined with his express determination that the verdict was in fact excessive, a new trial was, and still is, the only appropriate and logical remedy.

MCR 2.630 clearly applies here. "Other disability" clearly includes circumstances such as those here, where the trial judge is legally "disabled" by virtue of leaving the state court bench by retirement, or, as here, resigning to accept an appointment to the federal bench. "Disability" is defined as not only physical or mental impairment, but legal impairment as well. The definition of "disability" includes "lack of legal qualification to do something." Webster's New Collegiate Dictionary, 1981, p 321.

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In People v Herbert, 444 Mich 466, n 16; 511 NW2d 654 (1993), overruled on other grounds, People v Lemmon, 456 Mich 625; 576 NW2d 129 (1998), the Court discussed application of MCR 2.630 in the context of disability of a trial judge due to retirement ("In considering the motion for new trial on remand, however, Judge Sosnick will need to determine initially whether he is able to make a factual ruling on the credibility of witnesses whose testimony he did not observe or hear. We offer no opinion regarding whether he can decide the motion for new trial on the basis of the entire record, including the extent to which the testimony of the witnesses was corroborated by other witnesses and by the documentary evidence, or whether he should grant a new trial as a substitute judge may do under MCR 2.630 and MCR 6.440(C)." (Emphasis added).)

Accordingly, where as here the successor trial judge has expressly made the determination specifically permitted by the last sentence of MCR 2.630 after trial has been had--that he is "not satisfied" that he can perform the duties prescribed by the court rules--the remedy is a new trial, not remand to require the trial judge to perform duties he is "not satisfied" he can properly perform.

D. A New Trial Should Not Be Limited To Damages Only, As This Is Not An "Extraordinary Situation" Where "Liability Was Clear," And In Any Event The Decision To So Limit A New Trial Should Be In The First Instance A Decision Within The Discretion Of The Trial Court.

In the lead opinion, in discussing the remittitur/new trial issue, the Court of Appeals initially observes that the trial court under MCR 2.611(A) and (E) "has the discretion and option to grant a new trial on damages only" (Appx 58a, opinion, p 11). However, in the penultimate paragraph of the lead opinion, the Court then declines to allow the trial court to exercise discretion and directs that if the trial court grants a

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new trial, "it shall be as to damages only. Kellom v City of Ecorse, 329 Mich 303, 310; 45 NW2d 293 (1951) . . ." (Appx 59a, opinion p 12).

Defendants first submit that the usurpation of trial court's discretion on the partial new trial issue is inherently inconsistent with the Court of Appeals' conclusion regarding the need for the trial court to attempt to arrive at a remittitur amount. Consistent with and as a logical extension of the Court's rationale for directing that the trial court must in the first instance attempt to exercise its discretion to decide an amount for remittitur, if possible, appellate courts should likewise defer to the trial court to exercise its discretion as to whether, if a new trial is to be granted, it should be limited to damages only.

Defendants further submit that in any event limiting a new trial to damages is in this case inappropriate. While the trial court may under some circumstances have the discretion to grant a new trial as to damages only, defendants submit that this quite simply is not such a case.

In Kellom v City of Ecorse, 329 Mich 303, 310; 45 NW2d 293 (1951), the Court remanded for a new trial limited to the question of damages without explanation, other than noting that it had the power to do so. However, subsequent to Kellom, the Supreme Court has made clear that new trials limited to damages only are "disapprov[ed]" and are to be granted only in an "exceptional situation" where "the liability was clear." Trapp v King, 374 Mich 608, 611; 132 NW2d 640 (1965), citing Garrigan v LaSalle Coca Cola Bottling Co, 373 Mich 485; 129 NW2d 897 (1964).

In Garrigan v LaSalle Coca Cola Bottling, supra, plaintiff appealed a jury verdict in an automobile negligence action asserting that a new trial as to damages only should be granted because the verdict was grossly inadequate and the record

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was unclear as to part of the foreman's rendition of the jury verdict. Garrigan, 486. Although agreeing that a new trial was required because the verdict was grossly inadequate, and that there was confusion during the foreman's reading of the verdict, the Court reasoned:

> As to plaintiff's request for partial new trial as to damages, attention is directed to the statement in the recent case of Bias v Ausbury, 369 Mich 378, 383; 120 NW2d 233 as follows:
>
> "'While permitted by rule, we do not favor partial new trial limited to damages alone.'"
>
> In Bias v Ausbury, partial new trials as to damages were permitted because "under the peculiar facts" in that case the liability was clear. In this case, there is no such contention; therefore, a full retrial of all issues is indicated. [Garrigan, 489.]

In this case, liability certainly was not clear. Issues related to liability, including the factual foundation for the asserted malpractice, such as what advice was given by Dr. Patel to plaintiff's decedent, and when, was vigorously disputed, with conflicting testimony between Dr. Patel and those family members with respect to those occasions on which they accompanied plaintiff's decedent. (Compare Appx 30a, Patel, Tr 5/16/00, p 151, Appx 12a, Melody Scott, Tr 5/17/00, p 122.) It was also defendant's position that family members in fact prevented plaintiff from taking her medication (Appx 8a-11a, Patel, Tr 5/16/00, pp 60-63). Further, experts on each side disputed what conduct was or was not required by the standard of practice.

Liability, proximate cause and damages were inextricably intertwined in light of the fact that plaintiff had an underlying progressive illness, hypertension, and the concession that under any circumstances, plaintiff's need for dialysis was inevitable.

Damages here are directly dependent on plaintiff's life expectancy. Plaintiff accused Dr. Patel of a variety of breaches of the standard of practice some or all of

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which would have affected plaintiff's decedent's life expectancy, given the continuing operation and effect of her pre-existing illness. A jury determination of what alleged acts of malpractice were in fact malpractice, and which or how many among them was a proximate cause of plaintiff's eventual death, are inextricably intertwined with the determination of life expectancy and damages.

Further, the jury's verdict is so extraordinarily excessive that it can only be concluded that the determination of liability was likewise flawed by an inability to come to a decision supported by the proofs. As set forth in defendants' brief on appeal in the Court of Appeals, the verdict exceeded by at least sevenfold any arguably comparable verdict. The jury's finding of damages being so clearly tainted, it can only be assumed that the finding of liability was likewise probably corrupt.

In Doutre v Niec, 2 Mich App 88; 138 NW2d 501 (1965), the Court reversed the trial court's order for a new trial as to liability because of an error which the trial court had concluded could have affected only liability and not damages. The Court of Appeals, in holding a full retrial of all issues was required, reasoned:

> The limitation of the trial on the issue of liability only poses a more difficult problem. It has long been recognized that the questions of liability and damages are so closely intertwined that they may not usually be separated. The only exception the Michigan Supreme Court has so far recognized is the case wherein "liability is clear" a retrial of the issue of damages alone may be permitted. Trapp v King (1965), 374 Mich 608; 132 NW2d 640.
>
> In this case the Court reiterated its position that despite the court rule authorizing it (GCR 1963 527.1), limited new trials are not favored. No compelling reason moves us to extend the rule.
>
> The trial judge's opinion states: "This ruling (on the evidentiary question) may have materially influenced the jury on the liability issue. It could not, however, by any stretch of the imagination have affected the issue of damages." This speaks an assurance we do not share.

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> In the case before us the damages are not liquidated and the liability was determined pursuant to a trial in which an admitted error touching on liability was committed. Under these circumstances, it seems to us that justice requires that the jury which determines the liability or lack of it should have the responsibility for measuring any damages.

Likewise here, defendants submit that justice requires that the same jury which determines the liability should have the responsibility for measuring any damages.

In Dekker v Lubbehusen, 114 Mich App 270; 318 NW2d 653 (1982), the Court found that the "liability was clear" standard was met where it was evident from the proofs that "there was no way this accident could have occurred except for the negligence of the vehicle's driver." In this case, liability was not so clear--it was undisputed that plaintiff had an underlying debilitating medical condition and that at the time of her death she was suffering from severe infection which defendants submitted was unrelated to the alleged malpractice.

At a minimum, the question of whether a new trial should be limited to damages only should await a determination by the trial court, first, as to how excessive the damages actually were.

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RELIEF REQUESTED

WHEREFORE defendants Jayesh Kumar Patel, M.D., and Comprehensive Health Services d/b/a The Wellness Plan respectfully request that this Honorable Court grant leave to appeal, reverse the judgment, direct that a new trial be held, and that the cap on noneconomic damages be applied.

Respectfully submitted,

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